

THOMAS L. GRAY

IBLA 89-495

Decided December 3, 1991

Appeal from a decision of the Bureau of Land Management, Kobuk, Alaska, District Office, denying application for reindeer grazing permit. FF-085645.

Affirmed.

1. Act of September 1, 1937--Administrative Procedure: Burden of Proof--Grazing and Grazing Lands--Grazing Permits and Licenses: Generally--Evidence: Burden of Proof

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Department of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

APPEARANCES: Thomas L. Gray, White Mountain, Alaska, pro se.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Thomas L. Gray (appellant) appeals from a decision by the Kobuk District Manager, Bureau of Land Management (BLM), dated May 19, 1989, denying his application to graze reindeer on public lands managed by BLM located in the vicinity of McCarthys Marsh, which is situated in the south central area of the Alaskan Seward Peninsula. We recently upheld BLM's denial of a competing reindeer grazing application for McCarthys Marsh in Donald C. Olson, 120 IBLA 166 (1991). This case, however, raises slightly different issues, so we consider it on its own merits.

The application, filed with BLM on April 8, 1987, embraces lands totalling approximately 893,000 acres on the Seward Peninsula, including the eastern portion of the Bendeleben Mountains, the Darby Mountains, Death Valley, and McCarthys Marsh, and all available vacant public land bordered by the Elim Indian Reservation and the Harry Karmun and Douglas Seldon grazing permit areas, and adjoining lands to the west for which

Gray holds an existing grazing permit. Gray proposes to graze 700 head of reindeer on the lands in the first year, increasing the size of the herd to 2,000 head of reindeer over a 5-year period. Combined with the herd grazing on his adjacent 452,000-acre permit, Gray's eventual goal is to increase the total size of his reindeer herd to 5,000 head.

BLM denied appellant's application, finding that reindeer would significantly compete with caribou and moose populations that inhabit and use the area for winter forage:

The probability that caribou will be utilizing habitat within this area during the winter months is high, thus leading to the potential for serious conflicts between reindeer and caribou. Alaska Department of Fish and Game observations indicate the Western Arctic Caribou Herd is still increasing. A review of existing literature clearly identifies reindeer/caribou competition interactions as conflicts that are serious, complex, and widely recognized by both reindeer and wildlife interests. Interaction between domestic reindeer and caribou involves transmission of disease, attraction and inclusion of reindeer into migrating caribou herds, and direct and indirect competition for winter forage.

Another major concern we have for this area involves the high concentrations of moose during the winter months in riparian areas and along hillsides in McCarthys Marsh. Moose are especially vulnerable to disturbances that could arise from reindeer herding operations.

(BLM Decision at 1).

The Decision Record prepared by BLM contains an environmental assessment (EA) that assesses the following three alternatives and their respective probable impacts upon the proposed affected areas: (1) issuance of a permit for unrestricted reindeer grazing; (2) issuance of a seasonal grazing permit with modification of boundaries; and (3) denial of the permit.

The EA concluded that issuance of an unrestricted reindeer grazing permit would lead to significant conflict with terrestrial wildlife populations, including grizzly bear, wolf, caribou, and moose. The EA further concluded that if an unrestricted permit were granted, subsistence use in McCarthys Marsh, protected by section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a) (1988), would be affected, due to a "reduction in availability of resources in McCarthy's Marsh resulting from changes in the distribution, migration, or location of harvestable wildlife such as caribou and moose" (EA at 9).

BLM acknowledged that issuance of a winter seasonal permit would eliminate potential problems with bear predation, but concluded that it would not affect wolf predation. Modification of boundaries to limit the permit area to that area of McCarthys Marsh nearest to and abutting Gray's

existing lease would reduce conflicts between reindeer and both moose and caribou, according to the EA, but would not eliminate the potential for conflict between the herds (EA at 10). While subsistence use would be less impacted with the seasonal and boundary restrictions imposed by the second alternative, BLM concluded:

Based upon an evaluation by the staff wildlife biologists, there is some expected reduction in populations of species used for subsistence as a result of approving this alternative, and there is a limited expected reduction in availability of resources resulting from changes in the distribution, migration, or location of harvestable wildlife.

(EA at 10).

BLM concluded that the no-action alternative, or denial of the permit application in its entirety, was the only alternative which would ensure that terrestrial wildlife, particularly caribou and moose, would not be impacted; it therefore denied Gray's application for grazing permit.

Gray advances several reasons why his permit should be approved. Historically, Gray was issued a permit for the McCarthys Marsh and surrounding areas. He states that his original permit was issued for the range he now applies for, but there was no summer range; therefore, he traded it for the land he now grazes. Gray states that he now wishes to expand his permit area in order to gain a bigger winter grazing capacity, and "the McCarthy Marsh ha[s] some of the best lichen areas on the Seward Peninsula." Gray contends that the grazing of the McCarthys Marsh area will be of ecological benefit, since the lichens "should be grazed to keep a healthy balance," and will also minimize the likelihood of tundra fires. He has enclosed letters issued by the Bering Straits Coastal Management Program and the State of Alaska, Office of the Governor, Division of Governmental Coordination, which state, respectively, that "the intent of the Bering Straits Coastal Management plan is to strongly support and promote the development and enhancement of the reindeer industry," and that Gray's "project is consistent with the ACMP [Alaska Coastal Management Program]." Finally, appellant contends that he is being treated differently from other reindeer graziers who are permitted to graze ranges despite their use for caribou winter habitat.

Appellant and BLM do not disagree concerning the presence of lichen and the desirability and usefulness of the lichen as winter feed, and there is no dispute concerning the conclusion that winter grazing would not significantly harm lichen growth. The main dispute is whether the potential encroachment of caribou and moose populations southwest across McCarthys Marsh is cause for denial of seasonal grazing by Gray.

With regard to the overlap of the requested permit area and caribou winter habitat, the EA states that, "In 1987, caribou were in the Darby Mountains and were observed on the flats of McCarthy's Marsh between Telephone and Omilak Creeks. There have also been numerous observations

of caribou in the Windy Creek area this past winter; it was reported that a party of hunters harvested 30 caribou in this area in early March of 1989" (EA at 2).

Concerning the location of moose habitat, the EA states:

Most of the high moose density habitat lies in the eastern portion of McCarthy's Marsh as well as upper Pargon Creek, Boston Creek, upper Fish River, Lava Creek, Telephone Creek, Mosquito Creek, and Omilak Creek. Much of the medium moose density habitat lies along the middle portion of Pargon Creek, Baker Creek, Wagon Wheel Creek, Windy Creek, Rathlatulik River, and lower Fish River. The low moose density habitat lies in the western portion of McCarthy's Marsh * * *.

(EA at 5).

On appeal, appellant challenges BLM's findings concerning the potential clash in the marsh between caribou and reindeer, stating:

Since I started my reindeer herd seven years ago, I have kept close track of caribou migrations. They haven't used the McCarthy Marsh every year since I started. At the most I would estimate three to four hundred caribou have been in the McCarthy Marsh-Death Valley at one time. They have used a little corner of the McCarthy Marsh * * *.

Gray maintains that there is a burned area separating the dense lichen cover in the marsh that would provide forage for winter reindeer grazing, and the areas used by the caribou. This is confirmed in the record by Knapman: 1/

This alternative [advocating approval of part of the acreage applied for and restricting use to winter grazing] is a description of those impacts which would occur if the BLM issued a seasonal grazing permit for a portion of the area applied for. This would allow Gray to use a portion of the McCarthy marsh unit west of Fish River (there is a large burn between Fish R. & Telephone Cr.) and south of Omilak Creek in exchange for non-use on a portion of his permitted winter range. [Emphasis in original.]

Gray further argues that if caribou encroach, he can move his reindeer herd, as he has other lands available for grazing. "Good management of the reindeer," he states, "will prevent having a caribou-reindeer problem." With regard to competing moose populations, Gray argues that moose and reindeer do not compete for the same feed during the winter.

1/ The BLM file contains comments, apparently in reference to a draft EA, by three different persons, presumably BLM employees, one of whom is identified as Knapman.

The EA manifests some ambivalence concerning whether the second alternative would impact upon caribou and moose populations. ^{2/} BLM, however, draws the following conclusion with respect to the impacts of the seasonal grazing of limited acreage in McCarthys Marsh upon the three herds:

This alternative should reduce impacts to moose by excluding much of the high moose density areas. Regardless of where the new boundary is drawn on a map, without close herding, reindeer will certainly have the opportunity to cross this imaginary line into areas not allowed by this alternative.

Modification of the boundary should also reduce impacts with caribou, but not eliminate them. As with moose, wandering reindeer can cross a modified boundary line and link with migrating caribou.

Id. at 10.

[1] Section 14 of the Reindeer Industry Act of 1937, 25 U.S.C. § 500m (1988), authorizes the Department to issue rules and regulations specifically governing the grazing of reindeer on public lands:

In order to coordinate the use of public lands in Alaska for grazing reindeer with the purposes of this subchapter, the Secretary of the Interior is hereby authorized to regulate the grazing of reindeer upon said lands. He may, in his discretion, define reindeer ranges and regulate the use thereof * * *; issue grazing permits; * * * and may issue rules and regulations to carry into effect the provisions of this section.

Departmental regulation 43 CFR 4310.1 governs Alaskan reindeer grazing:

Vacant and unreserved and unappropriated public lands are subject to inclusion in a reindeer grazing permit. Where these lands are within the natural migration routes of caribou, or when they have other important wildlife values, the lands may be included in a permit, at the discretion of the authorized officer after consultation with the Alaska Department of Fish and Game, subject to such special terms and conditions as may be jointly agreed upon. [Emphasis supplied.]

On May 17, 1989, the Alaska Department of Fish & Game (ADF&G) went on record as opposing the expansion of reindeer grazing by Olson and Gray into McCarthys Marsh. In a letter to the Kobuk District Manager, the ADF&G stated:

^{2/} In introducing the description of the environmental impacts of this alternative the EA states: "This alternative would conceivably reduce conflicts with moose on winter range and with caribou that may enter McCarthy's Marsh from Death Valley" (EA at 9).

Both ADF&G and BLM are well aware of the incompatibility of reindeer and caribou on common ranges. There is a long and well-documented history of conflict between these animals in Alaska, involving forage resources, disease, predators, and loss of reindeer to caribou herds. Both agencies have established policy for reindeer grazing because of the degree of conflict between wildlife and reindeer grazing. In the Western Arctic Caribou Herd Strategic Management Plan (approved by the Board of Game in 1984), the department went on record as opposing the expansion of reindeer grazing into areas used by caribou. Since that time, the ADF&G has been involved, along with the BLM and the Reindeer Herders Association, with efforts to determine caribou use in several areas in proximity to existing reindeer grazing areas. Over the past few years McCarthy's Marsh and the surrounding mountains have been documented to support overwintering caribou. This use may increase as the Western Arctic Caribou Herd continues to grow from its present high numbers.

While reindeer grazing as an activity (at the stocking rates proposed) may be consistent with the Habitat Standard of the ACMP, that does not make it desirable to superimpose the activity upon caribou winter ranges and thereby create new conflict. As you know, it is often the reindeer industry that suffers losses as the result of reindeer and caribou conflicts. It does not serve the interests of the public, the herders, nor the resource management agencies to expand reindeer grazing in an area commonly used by caribou.

The ADF&G is also concerned about impacts to other important wildlife species from reindeer grazing in McCarthy's Marsh. Specifically, disturbance from herding operations to wintering moose along drainages and open hillsides in late winter, when energy expenditure or stress can be critical, is an example. The introduction of reindeer into the McCarthy's Marsh area would stimulate the conflicts cited above and would be unlikely to benefit anyone, including the reindeer industry.

(Letter of May 17, 1989, at 1-2).

In Donald C. Olson, supra at 170, we described the parameters of BLM's discretion to issue or deny permits pursuant to authority granted it by the Reindeer Industry Act of 1937 as follows:

That Congress authorized the Secretary of the Interior in his discretion to issue reindeer grazing permits implies that the Secretary is also authorized by Congress to, in his discretion, refuse to issue such permits. United States v. Wilbur, 283 U.S. 414 (1931); Williams v. United States, 138 U.S. 514 (189[1]). The measure of the Secretary's authority to refuse to perform a discretionary act authorized by Congress is whether the Secretary

has exercised a reasonable discretion. United States v. Wilbur, supra at 419. Under such circumstances, Congress does not authorize the Secretary or his delegates to act arbitrarily. Williams v. United States, supra at 524. Appellant has not established that BLM's denial of the permit was in error or otherwise constituted an abuse of discretion * * *. [Emphasis in original.]

Similarly, in this case, although Gray disagrees with the Alaska Department of Fish and Game about whether there is a potential problem with caribou and states he would manage his herd to avoid such problems, he has not established that they will not occur or that BLM has abused its discretion in deciding to prevent them by refusing to allow him to increase his range. And although he points out that the reindeer and the moose eat different food, and offers to work with any agency on studies in McCarthys Marsh, he does not indicate that the moose would not be disturbed by his reindeer herding activities. On this issue, too, it is a reasonable exercise of BLM's discretion to decide to preclude the risk of such an impact. The fact that reindeer herding is consistent with the Bering Straits Coastal Management Plan and the ACMP does not require BLM to approve an application for a permit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

